DOCKET NO. FBT-CV-15-5030346-S	:	SUPERIOR COURT
AMIEL DABUSH DOREL	:	J.D. OF FAIRFIELD
	:	
v.	:	AT BRIDGEPORT
	:	
LLOYDS LONDON	:	May 11, 2016

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, certain Underwriters at Lloyd's, London ("Underwriters"), submit this reply in further support of their motion pursuant to Practice Book § 17-44, *et seq*., for an order directing the entry of judgment. (Entry No. 103.00) Plaintiff's attempt to raise a question of fact fails. The facts admitted by plaintiff demonstrate that the theft of copper pipes is not covered by the policy. The policy provides no coverage for such a loss where the dwelling has been vacant for 60 days prior to the loss. Plaintiff does not dispute the residence was unoccupied for the sixty days preceding the loss. Plaintiff's argument, that the dwelling was "being constructed" at the time of the loss, does not save his claim. The plain meaning of the words appearing in the contract and the undisputed facts establish that the dwelling was not "being constructed." Even if plaintiff raised a question of fact as to whether the residence was "being constructed" such an issue would not be a material fact that requires trial because the policy does not provide coverage for a dwelling "under construction".

ARGUMENT

POINT I
PLAINTIFF FAILED TO RAISE A QUESTION OF FACT WHETHER THE LOSS WAS EXCLUDED BY THE VACANCY EXCLUSION

Plaintiff contends that the vacancy exclusion is ambiguous to the extent that it states a "dwelling being constructed is not considered vacant." Plaintiff argues that the theft of copper pipes occurred while he was in the process of repairing basement water damage. As such,

plaintiff contends the June 2014 theft occurred at a "dwelling being constructed" and is covered by the insurance policy. Plaintiff misapplies the rules of contract interpretation in seeking to avoid the consequences of a theft loss to vacant property. Specifically, plaintiff asks the court to apply a tortured interpretation to the term "being constructed" to create an ambiguity where, under their ordinary meaning, the words used are unambiguous.

When construing an insurance policy and determining the intent of the parties "[i]f the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning." *Liberty Mutual Insurance Company v. Lone Star Industries, Inc.*, 290 Conn. 767, 795-6, 967 A.2d 1 (2009).

In determining the natural and ordinary meaning of a term used in an insurance policy, it is proper to refer to the dictionary definition of the term. *New London County Mutual Insurance Company v. Zachem*, 145 Conn. App. 160, 74 A.3d 525 (2013); *DeCarlo & Doll, Inc. v. Dilozir*, 45 Conn.App. 633, 648–49, 698 A.2d 318 (1997).

The natural and ordinary meaning of the phrase "dwelling being constructed" describes a condition far different than the repair of interior finishes. The common dictionary definition of the verb "construct" is "To form by putting together parts; build; frame; devise." The Living Webster Encyclopedic Dictionary of the English Language (1972). See also, Black's Law Dictionary Revised Fourth Edition (1968) ("To build; erect; put together; make ready for use … To adjust and join materials, or parts of, so as to form a permanent whole … To put together constituent parts of something in their proper place and order."). In contrast, the ordinary meaning of the verb "repair" is "To restore to a sound or good state after decay, injury,

dilapidation, or partial destruction; …". The Living Webster Encyclopedic Dictionary of the English Language (1972). [1]

The interpretation of an insurance policy also requires the Court to look at the language used by the entire policy. *Liberty Mutual Insurance Company v. Lone Star Industries, Inc.*, 290 Conn. at 796. Here, the use of the terms "construction", "demolition", "remodeling", "renovation", and "repair" in the policy demonstrates that each term has a distinct meaning. See e.g., Ex. A to Brown Aff. [2] at Dwelling Property 3 Special Form Coverages A.12.a. (p.24) ("(1) The construction, demolition, remodeling, renovation or repair of that part of a covered building … (2) The demolition and reconstruction of the undamaged part of a covered building … (3) The remodeling, removal or replacement of the portion of the undamaged part of a covered building …"). Each term is used in a distinct context. The terms are not used interchangeably.

When the parties intended a provision to broadly apply the words "construction", "demolition", "remodeling", "renovation" and "repair" were separately stated thereby expressing that intent. However, the phrase in the policy on which plaintiff relies does not say a "dwelling being constructed, demolished, remodeled, renovated or repaired is not considered vacant." As was done in other provisions in the policy, the parties could have used those additional words had it been intended that there be a broad exception to the vacancy exclusion. Instead, the phrase on which plaintiff relies is narrowly worded ("A dwelling being constructed is not considered vacant."). Thus, the policy read as a whole does not support plaintiff's interpretation.

---

[1] Plaintiff asserts that the Court should interpret the insurance contract by reference to OSHA regulations. OSHA regulations were promulgated to set occupational health and safety standards. 29 CFR § 1910.1(a). Plaintiff offers no explanation as to why the Court should refer to OSHA regulations to find the natural and ordinary meaning the phrase "being constructed." It should also be noted that OSHA regulations do not define that term. Plaintiff misquotes the regulations. 29 CFR § 1926.32 states "The following definitions shall apply in the application of the regulations in this part: … 'Construction work.' For purposes of this section, 'Construction work' means work for construction, alteration, and/or repair, including painting and decorating."

[2] "Brown Aff." refers to the Affidavit of Antoine G. Brown submitted in support of the motion. Entry No. 104.00.

The work to repair the May 2014 water damage, as described by plaintiff, does not describe a "dwelling being constructed." The bottom two feet of drywall in a basement room became wet and was being removed and replaced. In addition, wood laminate flooring in the basement room was being replaced. See Plaintiff's Objection p.2, "Factual Circumstances of this case", Entry No. 107.00. While such work might constitute "remodeling", "renovation" or "repair" in the natural and ordinary meaning of those words, it does not describe a "dwelling being constructed."

To the extent the dwelling was not "being constructed", plaintiff does not dispute that the dwelling was not occupied and was vacant throughout his ownership and more than sixty days prior to the June 20, 2014 loss. This case is indistinguishable from the loss considered by the Court in *New London County Mutual Insurance Company v. Zachem*, 145 Conn. App. 160, 74 A.3d 525 (2013), a case involving identical policy wording and analogous facts. As in *Zachem*, judgment finding no coverage for the theft of copper pipes should be entered.

POINT II
EVEN IF THE DWELLING WAS "BEING CONSTRUCTED", LOSS CAUSED BY THEFT IN A DWELLING UNDER CONSTRUCTION IS EXCLUDED FROM COVERAGE

Even if, as plaintiff argues, the theft loss occurred at a "dwelling being constructed", the loss would still be excluded from coverage. The policy provides at Section A.2.c.(4):

> PERILS INSURED AGAINST
> A. Coverage A – Dwelling And Coverage B – Other structures
> 1. We insure against risk of direct physical loss to property described in Coverages A and B.
> 2. We do not insure, however, for loss:
> …
> c. Caused by:
> …
> (4) Theft in or to a dwelling or structure under construction.

Plainly, the parties to the insurance contract understood no coverage would be provided for a loss caused by theft where the theft occurs in or to a dwelling under construction. [3]

Here, plaintiff admits the loss was caused by the theft of copper pipes. In seeking to avoid the clause that provides the policy does not insure loss caused by theft if the property has been vacant for more than 60 consecutive days, the plaintiff contends that theft occurred while the dwelling was "being constructed." Plaintiff testified at his deposition that repair of the damage from the May 2014 water loss was not complete ("[W]e replaced some of the floor, maybe 75 percent of the floor."). Dorel Dep. p.82. [4] Plaintiff argues since the repairs were ongoing the dwelling was "being constructed". However, the policy language quoted above makes clear, there is no coverage for loss caused by theft in a dwelling under construction. Accordingly, even under plaintiff's interpretation the policy does not provide coverage for the June 20, 2014 theft.

CONCLUSION

Defendants respectfully submit that summary judgment should be entered in their favor and against plaintiff together with such other and further relief as to the Court seems just and proper.

Dated: Wilton, Connecticut

Defendants,
Certain Underwriters at Lloyd's, London

By: /s/ William A. Meehan
William A. Meehan
Juris No. 414310
Slutsky, McMorris & Meehan, LLP
396 Danbury Road
Wilton, Connecticut 06897
(203) 762-9815

[3] The "under construction" exclusion is also pleaded in defendants' third special defense. Entry No. 102.00.
[4] "Dorel Dep p. __" refers to Amiel Dabush Dorel's September 29, 2015 deposition transcript that is attached as Exhibit D to the Affidavit of William Meehan (Entry No. 105.00).

CERTIFICATION

This is to hereby certify that a copy of the foregoing was mailed on May 11, 2016 to counsel and all pro se parties of record as follows:

Edward J. Leavitt, Esq.
25 Bluff Avenue
West Haven, CT 06516

Amiel Dabush Dorel
14 Marshall Lane
Weston, CT 06883

/s/ William A. Meehan
William A. Meehan